IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 864 OF 2007

Rubina Siraj Sayyed .... Applicant

versus

The State of Maharashtra ..... Respondent.

Mr. S.R.Chitnis Sr. adv. with Mr. H.E.Mooman & Mr. R.G.Gadgil for the applicant.
Mr. P.A.Pol APP for State.

CORAM; A.P. DESHPANDE, J.
DATED; 12TH DECEMBER, 2007

P.C.;

1. The present applicant is original accused no.2 who has been held guilty for the offence punishable under section 120-B of IPC read with section 3(1)(ii) of MCOC Act and sentenced to suffer R.I. for a period of five years and to pay a fine of Rs. 5 lacs in default to suffer further R.I. for six months. The applicant is also held guilty for the offence punishable under section 3(2) read with 2(a) of the MCOC Act and is sentenced to suffer R.I. for 5 years and to pay a fine of Rs.5 lacs in default to suffer R.I. for six months. The applicant is also held guilty for the offence punishable under section 3(4) of MCOC Act and sentenced to suffer R.I. for 5 years and to pay a fine of Rs. 5 lacs in default to suffer further R.I.

for six months. The substantive sentences are to run concurrently as directed by the special Judge under MCOC Act. Against the said judgment, an appeal preferred by the applicant has been admitted by this court.

2. The learned Senior counsel appearing for the applicant Mr. S.R.Chitnis, contended that the present applicant is a woman and has been in custody for a period of about three and a half years. He submits that out of sentence of five years as the applicant has been in custody for a period of three and half years, coupled with the fact that the appeal is not likely to be heard within the remaining period of sentence of one and half years, the applicant need to be released on bail. The learned counsel has placed reliance on an order passed by a learned Single Judge of this Court (Justice B.H.Marlappale) dated 7-8-2007, disposing of Criminal Application No.788/07. Under the said order the applicant who was convicted by the special court under MCOCA for the offences punishable under section 3(2) as well as section 3(1)(ii) of the Act has been released on bail. The said order is relied upon to contend that a convict who has undergone sentence for more than three and half years out of the maximum sentence of five years, convicted under MCOCA was released on bail. The learned Single

Judge in turn has placed reliance on the judgments of the Supreme Court in the Case of **Bhagwan Rama Shinde Gosai and others Vs. State of Gujarat reported in (1999) 4 SCC 421 AND Shailendra kumar Vs. State of Delhi reported in (2000) 4 SCC 178.** It is relevant to note that the learned Single Judge has not considered the effect of section 21(4) of the MCOC Act vis-a-vis section 439 of the Code. The order relied upon does not lay down any ratio. The Supreme Court's Judgments relied upon by the learned Single Judge are dealing with offences under Indian Penal Code and not under MCOCA, TADA or NDPS, which impose stringent conditions for grant of bail.

3. The learned APP has stoutly resisted the application for grant of bail by contending that powers of this court for grant of bail under the Code are subject to the provisions of section 21(4) of MCOC Act and unless and until this court is satisfied that there are reasonable grounds for believing that the applicant is not guilty of the offences and that he/she is not likely to commit any offence while on bail, then and then alone, the order of bail can be passed and not otherwise. It is then contended that sub section (4) of section 21 begins with a non obstenti clause and thus has an overriding effect over the provisions of the Code. To overcome the stringent

conditions imposed by section 21(4) of MCOC Act, the learned counsel for the applicant has submitted that the special powers of the High Court or Court of Sessions in regard to grant of bail contained in section 439 are in no way curtailed by the povisions of section 21(4) of MCOC Act. In the submission of the learned counsel, after the conviction of an accused, section 21 of the MCOCA ceases to operate. It is submitted that the phraseology used in sub section (4) of section 21 viz. 'no person accused of an offence punishable under this act'- relates to pre-trial stage and 'any person accused of an offence' would not cover an appellant before this court who questions the correctness of a judgment and order of conviction passed by the special Judge.

4. Reliance is placed by the learned counsel for the applicant on a Division Bench judgment of this court in case of **Fakira Ramdas Chaudhary Vs. State of Maharashtra reported in 1994 Cr.L.J. 1805.** In the said case the Division Bench was dealing with the situation wherein the accused was acquitted and an appeal against the acquittal was carried to the High Court. The question that fall for consideration of the Division Bench was whether bar of section 37 of the NDPS Act (which is similar to section 21(4) of MCOC Act) would override the discretion to grant or

refusal of bail while exercising powers under section 390 of the Code. In the context of this factul situation, the Division Bench has held that the provisions contained in section 37 of the NDPS Act shall have no application when a bail application of an acquitted accused is being considered under section 390 of Cr.P.C. It will not be out of place to mention that the provisions of section 21(4) of MCOCA and the provisions of section 37(1)(b) of NDPS Act are pare-materia and are couched in similar language. Same is the position under section 20(8) of TADA Act. It can be safely said that what is true of the interpretation of section 21(4) of MCOCA is equally true in regard to the interprettion of provisions of section 20(8) of TADA and 37(1)(b) of NDPS Act and vice a versa. It is thus clear that the Division Bench has held that the bar of jurisdiction contained in section 37 of NDPS Act for grant of bail will cease to apply and the discretion conferred under section 390 of Cr.P.C. will come into operation.

5. The learned counsel for the applicant has then relied upon a judgment of the Supreme Court in case of **Hintendra Vishnu Thakur Vs. State of Maharashtra reported in 1994 S.C.C. (Cri) 1087.** The said case was under Terrorist And Distruptive Activities (Prevention) Act, 1987 and to be precise under section

20(4) which goes to modify section 167 of the Cr.P.C. and extends the period of detention of the accused. The submission was that the restrictions for grant of bail under section 20(8) would be applicable to the grant of bail even in a case covered by section 20(4) of TADA. In that context, the Supreme Court in para 30 of the judgment held thus:

> "In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under section 20(4) has to make an application to the court for grant of bail on grounds of 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since section 20(8) does not control the grant of bail under section 20(4) of TADA and both the provisions operate in separate and independent fields."

6. It is thus clear that the said judgment does not deal with the question of compliance and satisfaction

of conditions envisaged by section 20(8) of the Act in the situation as has emerged in the case in hand. Hence the judgment in **Hintendra Vishnu Thakur's** case does not advance the case of the applicant any further.

7. Per contra tghe learned A.P.P. Mr. P.A.Pol has submitted that unless and until the conditions laid down by section 21(4) of MCOC Act are complied with this court has no jurisdiction to release the accused from jail by having recourse to section 439 of the Code. In support of the said submission, the learned A.P.P. has placed reliance on a judgment in **Narcotic Control Bureau, Vs. Kishanlal and others reported in 1991 Cr.L.J. 654.** In para 6 of the judgment the Supreme Court has clearly held that the provisions of section 439 of Cr.P.C. are subject to the limitations mentioned under section 37 of the NDPS Act. The Supremem Court has observed thus:

> Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were statisfied. The NDPS

Act is a special enactment and as already noted it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of section 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, in our view, it cannot be held that the High Court's powers to grant bail under section 439 Cr.P.C. are not subject to the limitation mentioned under section 37 of NDPS Act. The non-obstante clause with which the section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of insonsistency between Sec.439 Cr.P.C. and Sec. 37 of NDPS Act, Sec.37 prevails. In this context S. 4 Cr.P.C. may be noted which reads thus:

Trial of offences under the Indian Penal Code and other laws - (1) All offences under the Indian Penal Code (45 of 1960) shall be investigated, inuired into, tried, and otherwise dealt with according to the

provisions hereinafter contained.

(2) All offences under any other law shall be investigated,inuired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

It can thus be seen that when there is a special enactment in force relating to the manner of investigation, enquiry or otherwise dealing with such offences, the other powers under Cr.P.C. should be subject to such special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be borne in mind. IN Lt. Col. Prithi Pal Singh Bed etc. Vs. Union of India (1983)1 SCR 393: (AIR 1982 SC 1413), regarding the mode of interpretation the Supreme Court observed as follows:

"The dominant purpose in construing a statute is to ascertain the intention of Parliament.

> One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the Court should adopt literal construction if it does not lead to an absurdity."
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> As already noted, S.37 of the NDPS Act starts with a non-obstante clause stating that Notwithstanding anything contained in the Code of Criminal Procedure, 1873 no person accused of an offence prescriobed therein shall be released on bail unless the conditions contained therein are satisfied. Consequently the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in S.37 of the NDPS Act."

8. The learned prosecutor has also placed reliance on the judgment of the Supreme court in case of **Union of India Vs. Ram Samujh and another reported in (1999) 9 SCC 429,** The Supreme Court was called upon to interpret the provisions of section 37(1)(b) of NDPS Act. The Supreme Court has held in para 8 thus:

"To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in section 37, namely,

i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

ii) that he is not likely to commit any offence while on bail.

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

9. The conditions precedent for grant of bail under

section 37 of NDPS Act are similar to the conditions laid down by section 21(4) of MCOCA. What is true of the menace of dangerous drungs is eually true of the menace of organised crime. MCOCA has been enacted for prevention and control of criminal activity by organised crime syndicate or gangs. Thus it is submitted by the learned APP that the limitations on granting bail specified in sub section (4) are in addition to the limitation under the Code. Reliance is placed on the express language used in sub section (6) of section 21 of the Act.

10. Reliance is also placed on yet another judgment of the Supreme court in case of **Supdt. Narcotics Control Bureau. Chennai Vs. R. Paulsamy reported in 2000(9) SCC 549** which goes to hold that recording of findings under section 37 of the Act, is sine qua non for granting bail under the (NDPS) Act and hence no accused can be released on bail when the application is opposed by the learned Prosecutor, unless the court is satisfied that there are reasonable grounds for beliving that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The Court has further held that the power of the High Court in the matter of grant of bail under section 439 of the Code is subject to the limitation contained in section 37 of the NDPS Act. If this be

the position which emerges from the judgment of the Supreme court, the learned Prosecutor has submitted that unless and until the conditions contained in secion 21(4) of MCOC Act are satisfied no bail can be granted. Reliance is also placed on a judgment of the learned Single Judge of this court in **Anil Umrao Gote Vs. State of Maharashtra reported in 2005 All M.R. (Cri.) 350** which goes to hold that section 439 is subject to the restrictions imposed by section 21(4) of MCOC Act and hence unless and until section 21(4) is complied with, the court has no jurisdiction to grant bail.

11 An elaborate affidavit of the Assistant Commissioner of Police has been filed by the respondent on record with a view to bring home the seriousness of the offence for which the applicant has been convicted. It is stated in the affidavit that:

> "Dawood Ibrahim Kaskar @ Dawood Ibrahim is notorious underworld don operating from Karachi. Shaikh Shakeel Babu Mohiddin Shaikh @ Chota Shakeel, now based in Karachi,Pakistan is the leader of an Organised Crime Syndicate, a faction owing alliance to Dawood Ibrahim and is wanted in number of cases of organised Crime Syndicate. Mohd. Faceem Mohd. Sharif

> Khan @ Faceem Machmach a resident of Pathanwadi, Peru Lane, Bhendi Bazzar, Mumbai is a close associate of Chota Shakeel and after the serial bomb blasts in the 1993, he left India. At present, he is based in Karachi along with Chota Shakeel. Both Chota Shakeel and Faceem Machmach are operating from Karachi-Pakistan and they are indulging in continuing unlawful activities in Mumbai as the members of Organized Crime Syndicate led by Dawood Ibrahim."

12. The present applicant is said to be an active member of the said crime syndicate led by Daud Ibrahim. The applicant’s role in the said crime syndicate is to make provision for monetary support to the family members of the criminals who are in jail so also to engage lawyers for defending cases against the members of the syndicate and to arrange for payment of their fees etc. Very many instances are quoted in extenso in the affidavit to bring home the active participation of the applicant in the organised crime. Having regard to the affidavit filed on record and in view of the fact that the conditions contained in section 21(4) apply while granting bail, and it is not possible to hold that this court is satisfied that there are reasonable grounds for believing that the

applicant is not guilty of such offence and that she is not likely to commit any offence while on bail. In view of the fact that this court is unable to record a satisfaction as is envisaged by section 21(4)(b) of MCOC Act, I am constrained to reject the bail application. However, having regard to the fact that the applicant is a woman who has undergone about three and half years of sentence in jail, out of the total sentence of five years, I deem it appropriate to expedite the hearing of the appeal and I fix the appeal for hearing in the week commencing from 7-1-2008. The application for bail is rejected.

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